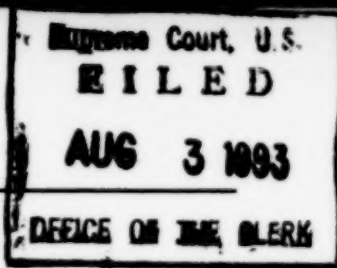


93-180

NO. _____



IN THE
**SUPREME COURT
OF THE UNITED STATES**
OCTOBER TERM 1993

BOCA GRANDE CLUB, INC.,
Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PETITION

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CLUB, INC., PETITIONER

62PP

QUESTION PRESENTED

SHOULD THIS COURT EXERCISE ITS JURISDICTION AND RESOLVE THE CONFLICT CREATED BY THE ELEVENTH CIRCUIT COURT OF APPEALS AND ENFORCE THE RULE APPLIED IN ALL OTHER CIRCUITS IN MARITIME CASES THAT SETTLEMENT BETWEEN A JOINT TORTFEASOR AND A PLAINTIFF BARS ALL CLAIMS FOR CONTRIBUTION BY NON-SETTLING TORTFEASORS AGAINST THE SETTLING TORTFEASOR?

LIST OF PARTIES

The parties to the proceeding sought to be reviewed are Petitioner, Boca Grande Club, Inc., and Respondent, Florida Power & Light Company. The parent of Petitioner is Great American Insurance Company.

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NO. _____

IN THE
**SUPREME COURT
OF THE UNITED STATES**
OCTOBER TERM 1992

BOCA GRANDE CLUB, INC.,
Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION

Boca Grande Club, Inc., petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on May 12, 1993.

OPINIONS BELOW

The opinions below are:

1. Opinion of May 12, 1993 of the United States Court of Appeals for the Eleventh Circuit, *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (11th Cir. 1993). (Appendix A1).
2. Order dated March 26, 1992 of the United States District Court for the Middle District of Florida, Tampa Division. (Appendix A2).

JURISDICTION

The opinion and judgment sought to be reviewed were entered on May 12, 1993. This Petition for Writ of Certiorari has been filed within ninety days of the entry of said opinion and judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISIONS

"The judicial Power shall extend ... to all Cases of admiralty and maritime Jurisdiction ..." U.S. Const. Art. III, Sec. 2, cl.1.

STATEMENT OF THE CASE

A. District Court Jurisdiction

Jurisdiction of the United States District Court, Middle District of Florida, was based upon 28 U.S.C. §1333, 46 U.S.C. §181, *et seq.* and Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims.

B. Procedural History.

In June 1988 a law suit was commenced against Boca Grande Club, Inc. (hereinafter "Boca Grande Club") and Florida Power & Light Company (hereinafter "FP&L") in connection with a collision between a sailboat and a high power electric line designed, constructed, owned and maintained by FP&L. The collision occurred on April 23, 1988 in the navigable waters of the United States.

The sailboat was owned by Boca Grande Club and had been rented to Robert Polackwich, a club member. Robert Polackwich and Jonathan Richards, his stepson, were operating the sailboat at the time of collision and both were electrocuted.

The personal representatives of Robert Polackwich and Jonathan Richards, and other parties, (all hereinafter collectively referred to as "Decedents") started an action in state court for wrongful death. Following commencement of the action in state court, Boca Grande Club initiated an action for limitation of liability in October, 1988 in the United States District Court, Middle District of Florida, Tampa Division. A claim for indemnity and con-

tribution was filed in the limitation action by FP&L. Claims against Boca Grande Club were also filed in the limitation action on behalf of the Decedents and a claim for indemnity and contribution was filed by O'Day Corporation, the manufacturer of the sailboat.

In December, 1989 FP&L served a third party complaint against Boca Grande Club in the state court action initiated by Decedents. Boca Grande Club responded by filing a motion for an injunction in United District Court. In February, 1990 the district court entered its order enjoining the prosecution of claims against Boca Grande Club in any proceeding other than the limitation action. (Appendix A9).

In June, 1990, Boca Grande Club filed a motion in the limitation action seeking summary judgment as to all the claims pending in the limitation case. Thereafter, Boca Grande Club and the Decedents worked out a settlement of all claims filed by the Decedents in the limitation action and entered into a General Release. (Appendix A11). In December, 1990, Boca Grande Club and the Decedents filed a stipulation and joint motion seeking dismissal of all of Decedent's claims filed in the limitation action. (Appendix A21). In March, 1991, the district court granted the joint motion and dismissed all of the Decedent's claims. (Appendix A24). In April, 1991, Boca Grande Club filed another motion which sought summary judgment as to the indemnity and contribution claims of FP&L and the boat manufacturer, the only claims left in the limitation case. In March, 1992, the district court granted summary judgment on the indemnity and contribution claim of FP&L and administratively closed the file pending the outcome of bankruptcy proceedings involving the boat builder. (Appendix A5). The court entered judgment in favor of Boca Grande Club following its order granting summary judgment and in April, 1992 FP&L appealed to the United States Court of Appeals for the Eleventh Circuit. The summary judgment granted to Boca Grande Club by the district court was reversed by the Eleventh Circuit Court of Appeals on May 12, 1993. (Appendix A1).

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari sought by Petitioner should be granted for the following reasons:

1. To resolve the conflict existing between the Eleventh Circuit Court of Appeals and other federal circuits and require the Eleventh Circuit to apply the rule of maritime law that bars litigation of claims for contribution against a joint tortfeasor that has settled with a plaintiff.
2. To restore uniformity in the application of maritime law in federal and state courts in the Eleventh Circuit.
3. To restore settlement as a viable means of resolving multi-party maritime law suits in the federal courts of the Eleventh Circuit.

In *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied* 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988) (hereinafter "*Self*") the Eleventh Circuit, consistent with other federal circuits that have considered the question, adopted the rule that a settlement with a plaintiff bars claims for contribution by joint tortfeasors against the settling defendant. Following remand the district court applied the settlement bar rule announced in *Self*. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 1990 AMC 2247 (M.D. Fla. 1990). Thereafter the case, which involved a collision between a tank ship and a dredge, came before the Eleventh Circuit a third time. The court held that it had not adopted a settlement bar rule in *Self* and proceeded to declare, contrary to the rules theretofore applied in other federal courts in maritime cases, that when one tortfeasor settles with a plaintiff the contribution claims of non-settling defendants remain fully viable and can be litigated against the settling defendant. *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575, 1582-1583 (11th Cir. 1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992) (hereinafter "*Great Lakes*").

Relying on its decision in *Great Lakes* the Eleventh Circuit

reversed the summary judgment that had been entered in favor of Boca Grande Club and repeated that "under maritime law, a tortfeasor is not precluded from seeking contribution from a joint tortfeasor who has settled." *Boca Grande Club Inc. v. Polackwich*, 990 F.2d 606, 607 (11th Cir. 1993) (hereinafter "*Polackwich*"). (Appendix A2).

The rule adopted by the Eleventh Circuit in *Great Lakes* and applied in *Polackwich* is in direct conflict with settlement bar rules applied by other circuits in maritime cases, fails to adhere to the principle of uniformity in maritime law, ignores the policy of this Court and general law which favors settlement, effectively extinguishes settlement as a means of resolving maritime claims in federal courts in the Eleventh Circuit and promotes conflict between state and federal courts within the Eleventh Circuit. By exercising jurisdiction in this case and fulfilling its constitutionally mandated duty as an admiralty court, this Court can correct the conflicts as well as restore rationality, certainty and uniformity to this area of maritime law. *McDermott International, Inc. v. Wilander*, 498 U.S. ____ 111 S.Ct. 807, 112 L.Ed.2d 866 (1991).

In deciding what effect settlement is to have upon claims for contribution courts usually discuss three alternatives or options. The first permits non-settling tortfeasors to litigate their contribution claims against a settling defendant. This option favors continued litigation and is hostile to settlement. This is the option chosen by the Eleventh Circuit. The second alternative bars claims for contribution against settling defendants. This option permits a plaintiff to settle a portion of his claim and make the settlement final as respects the settling defendant. This option has the salutary effect of terminating litigation between the plaintiff and the settling defendant as well as the settling defendant and non-settling defendants on pending claims for contribution. The third option eliminates contribution by reducing the plaintiff's claim by the pro rata portion of the liability of the settling defendant. From this option flow the same beneficial results as are achieved by the second alternative; namely, certainty of result, promotion of settlement and termination of litigation. See: *Miller v. Christopher*, 887 F.2d 902, 905 (9th Cir. 1989).

The second and third options permit a defendant to make his peace, avoid risk of trial and the potential for being found liable for damages greater than the settlement amount and to stop litigation expenses. The alternative selected by the Eleventh Circuit promotes litigation and is contrary to the philosophy of the Federal Rules of Civil Procedure, Rules 1 and 68, as well as the general policy of the law and of this Court, which favors settlement. *Marek v. Chesney*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) (Powell, J. concurring). "The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto" *Pfizer, Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972), *cert. denied* 406 U.S. 976, 92 S.Ct. 2411, 32 L.Ed.2d 676 (1972).

Nothing in this Court's opinions in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 104, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), or *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) require, nor is there anything in general maritime law that mandates, utilization of the federal district courts and courts of appeal to fine tune allocations of fault between settling and nonsettling defendants or to second guess the decision of a plaintiff to settle a case. There is nothing contained in these three opinions that would inhibit the selection of alternatives two or three as the means of disposing of claims for contribution against a settling tortfeasor. Moreover, it is submitted that *Cooper*, *Reliable* and *Edmonds* do not support the proposition that nonsettling tortfeasors should be permitted to litigate claims for contribution against a settling defendant.

The Eleventh Circuit Court of Appeals stands alone in holding that a settling defendant must continue to defend himself against contribution claims brought by non-settling tortfeasors. Courts in the Second, Fifth, Eighth and Ninth Circuits, when confronted with the three alternatives on contribution claims, have all opted for a rule which bars further prosecution of contribution claims, or which makes contribution unnecessary.

The decisions of the Eleventh Circuit Court of Appeals in *Polackwich* and *Great Lakes* are in direct conflict with decisions in the Second, Fifth, Eighth and Ninth Circuits. In *Stanley v. Bertram-Trojan, Inc.*, 781 F.Supp 218 (S.D.N.Y. 1991) a settlement bar rule was adopted by the district court. Decisions in the Fifth Circuit differ as to how the proceeds of a settlement are to be applied against a plaintiff's claim but are uniform in holding that settlement bars claims for contribution. *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979); *Rowland v. Cenac Towing Co.*, 938 F.2d 599 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1242, 117 L.Ed.2d 474 (1992), *Hernandez v. N/V Rajaan*, 841 F.2d 582 (5th Cir. 1980) *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988). In *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991), the Eighth Circuit Court of Appeals adopted a settlement bar rule and criticized the position ultimately adopted by the Eleventh Circuit which preserves the right to litigate contribution claims after settlement. The rule adopted by the Eleventh Circuit in *Great Lakes* and applied in *Polackwich* was criticized at length by the Ninth Circuit Court of Appeals in *Miller v. Christopher*, 887 F.2d 902, 906-907 (9th Cir. 1989), where the court adopted a settlement bar rule and pointed out that, theretofore, no admiralty court had implemented a rule that kept contribution claims alive against a settling defendant. *See, In Re The Glacier Bay*, 1993 AMC 1530 (D. Alaska 1993) (*Great Lakes* rejected in favor of settlement bar rule.)

Great Lakes has already led to conflict between the law to be applied in maritime cases in federal and state courts within the Eleventh Circuit. Two days after the Eleventh Circuit entered its opinion reversing the summary judgment in favor of Boca Grande Club and remanding the case for further proceedings in Tampa, the Supreme Court of Alabama refused to follow the rule adopted by the Eleventh Circuit in *Great Lakes* and affirmed a summary judgment in favor of a settling defendant on claims for contribution by nonsettling defendants. *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, ___ So.2d ___, 61 U.S.L.W. 2745 (Ala. 1993). (Appendix A27). (Because a motion for rehearing has been filed, the Supreme Court of Alabama has not yet

released its opinion for publication. An unofficial slip copy of the opinion is contained in the Appendix to this Petition.)

The fundamental facts in *Amerada Hess* are no different than those in the instant case. In both a joint tortfeasor settled claims with the plaintiff, obtained a release, and then received summary judgment in its favor on the pending contribution claims of the non-settling defendants. Thus, a defendant in a maritime case being prosecuted in a state court in Alabama may safely enter into a settlement with the plaintiff and terminate all litigation against him. By contrast, in an identical maritime case pending in the United States District Court in Tampa, or Mobile, or Savannah, a defendant could not, by making peace with the plaintiff, escape from the law suit and its attendant expenses. The district courts in the Eleventh Circuit will be required to continue to deal with contribution claims against the settling defendant.

In its opinion the Supreme Court of Alabama found the reasoning of the Eleventh Circuit in *Great Lakes* to be flawed and noted that it was not obligated to follow the ruling of lower federal courts and pointed out that this is especially so when the lower federal courts are in conflict themselves as to what rule applies. (Appendix A45). Will it be long before the high courts in other states within the Eleventh Circuit follow the lead of the Supreme Court of Alabama in rejecting *Great Lakes* and establish settlement bar rules? Or will some of those courts opt to apply the Eleventh Circuit rule and create further disharmony? Only this Court can cure the conflict and restore uniformity and certainty.

In its opinion in *Great Lakes* the Eleventh Circuit was disingenuous as to the effect its rejection of a settlement bar rule would have upon the settlement of maritime cases. The Court assumed that permitting actions for contribution to continue against settling defendants would have "a slight disincentive effect upon settlements." 957 F.2d at 1582. Absent extraordinary circumstances there will be no incentive whatsoever for a joint tortfeasor to ever settle a maritime claim if he remains exposed to contribution. At some point in the lawsuit the proportional fault of the settling tortfeasor will be determined. How could such party not remain in the

action and continue to defend himself from efforts of the plaintiff and co-defendants to establish his share of liability? It would be foolhardy for a defendant to settle in a typical maritime case under the rule adopted by the Eleventh Circuit. Instead of being a "slight disincentive" the *Great Lakes* rule will destroy settlement as a means for resolving maritime disputes in federal courts in the Eleventh Circuit.

In *Great Lakes* the Eleventh Circuit wholly ignores the advantage settlement has to a plaintiff. The instant case is an excellent example. By settling all of their claims with Boca Grande Club the Decedents avoided trying their cases for wrongful death before a judge without jury in a limitation action. Boca Grande Club would have had no incentive to settle the claims with the Decedents if it knew that it would nevertheless remain in the case for the ultimate assessment of its proportional fault for the casualty and for the contribution claims of FP&L and O'Day Corporation to be adjudicated. In short, the plaintiffs in this case would never have been able to escape non-jury adjudication of their wrongful death claims.

The only rule that will preserve the principles of compromise of maritime claims and uniformity in admiralty law is a rule that bars prosecution of contribution claims against settling parties.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and exercise its jurisdiction to resolve the conflict created by the United States Court of Appeals for the Eleventh Circuit and enforce the rule applied in other circuits in maritime cases that settlement between a joint tortfeasor and a plaintiff bars all claims for contribution by non-settling tortfeasors against the settling tortfeasor.

Respectfully submitted,

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ATTORNEYS FOR BOCA GRANDE
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OCTOBER TERM 1993

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Respondent.

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In the Matter of the Complaint of BOCA GRANDE CLUB, INC.,
for exoneration from or limitation of liability as owner of a 16'
Prindle catamaran sailing vessel hull no. SUR06214M82E,
Plaintiff-Counterclaim defendant-Counterclaim plaintiff-
Appellee,

v.

Alan POLACKWICH, Robert Polackwich, Jonathan Richards,
Alphonsus J. Polackwich and Eleanor A. Polackwich,
Defendants-Counterclaim plaintiffs,

Stephanie Polackwich, as personal representative of the Estate of
Jonathan Richards, Defendant-Counterclaim plaintiff-
Crossclaim defendant,

O'Day Corporation, Defendant-Counterclaim plaintiff-Crossclaim
plaintiff-Crossclaim defendant,

Florida Power & Light Company, Inc., Defendant-Counterclaim
plaintiff-Crossclaim defendant-Crossclaim plaintiff-
Counterclaim defendant-Appellant.

No. 92-2391.

United States Court of Appeals,
Eleventh Circuit.
May 12, 1993.

Stuart C. Markman, Kynes & Markman, Tampa, FL, for appel-
lant.

Jack C. Rinard, David F. Pope, Tampa, FL, for appellee.

Appeal from the United States District Court for the Middle
District of Florida, William J. Castagna, Judge.

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and
BRIGHT*, Senior Circuit Judge.

PER CURIAM:

In this case, the district court, invoking the settlement bar rule suggested by *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir.1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988), rejected Florida Power & Light Company's (FP & L's) claim for contribution against Boca Grande Club, Inc. (Boca Grande) and gave Boca Grande summary judgment. After judgment was entered and this appeal was taken, *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992), concluded that the issue of contribution was not before the court in *Self*, and held that, under maritime law, a tortfeasor is not precluded from seeking contribution from a joint tortfeasor who has settled. *Id.* at 1578, 1582-83. Accordingly, we must vacate the district court's ruling and remand the case for further proceedings. In doing so, we do not pass on Boca Grande's argument that we should affirm the district court's summary judgment because, on the record before us, FP & L is not entitled to contribution.

VACATED and REMANDED for further proceedings.

*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 92-2391

District Court No. 88-1636-CIV

IN THE MATTER OF THE COMPLAINT
OF BOCA GRANDE CLUB, INC., for exon-
eration from or limitation of liability as owner
of a 16' Prindle catamaran sailing vessel hull
no. SUR06214M82E,

Plaintiff-
Counterclaim defendant-
counterclaim Plaintiff-
Appellee,

versus

ALAN POLACKWICH, ROBERT POLACK-
WICH, JONATHAN RICHARDS, ALPHON-
SUS J. POLACKWICH, and ELEANOR A.
POLACKWICH,

Defendants-
Counterclaim Plaintiffs,

STEPHANIE POLACKWICH, as personal
Representative of the Estate of
Jonathan Richards,

Defendant-
Counterclaim Plaintiff-
Crossclaim Defendant,

O'DAY CORPORATION,

Defendant-
Counterclaim Plaintiff
Crossclaim Plaintiff-
Crossclaim Defendant,

FLORIDA POWER & LIGHT COMPANY, INC.,

Defendant-
Counterclaim Plaintiff-
Crossclaim Defendant-
Crossclaim Plaintiff-
Counterclaim Defendant-
Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and
BRIGHT*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record
from the United States District Court for the Middle District of
Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby
ordered and adjudged by this Court that the judgment of the said
District Court in this cause be and the same is hereby VACATED;
and that this cause be and the same is hereby REMANDED to said
District Court for further proceedings in accordance with the opin-
ion of this Court;

It is further ordered that each party bear their own costs on
appeal.

*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the
Eighth Circuit, sitting by designation.

Entered: May 12, 1993
For the Court: Miguel J. Cortez, Clerk
By: /s/Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: JULY 15, 1993

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 88-1636-CIV-T-15A

IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

ORDER

This action was brought by Boca Grande Club seeking limitation of liability for claims stemming from a maritime accident in which the mast of a sailboat struck a power line resulting in the deaths of two individuals. The estates of the deceased brought suit in state court against Florida Power and Light Corporation ("FPL") and the O'Day Corporation, the boat's manufacturer. Those defendants brought third party actions for contribution and indemnity against the Boca Grande Club which owned and leased the sailboat to the decedents. In response, Boca Grande brought this action.

Subsequent to the institution of this action, Boca Grande entered into settlement agreements with the decedents' estates. In its motion for summary judgment Boca Grande asserts that those settlement agreements bar FPL's claim for contribution and indemnity.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In reaching a summary judgment decision the court must view the facts in the light most favorable to the non-moving party. *United of Omaha Life Ins. v. Sun Life Ins. Co.*, 894 F.2d 1555, 1558 (11th Cir. 1990).

Initially, the Court notes that FPL concedes that its claim for indemnity is barred as a matter of law. Accordingly, the only issue remaining before this Court is whether FPL's contribution claim is likewise barred.

The parties agree that this is an action invoking the maritime jurisdiction of this Court. Accordingly, maritime law of the Eleventh Circuit provides the applicable substantive law. Under the current case law, a joint tortfeasor is barred from seeking contribution from a settling joint tortfeasor and the plaintiff may recover the full amount of damages, minus the amount received from the settling defendant, from the remaining tortfeasors. *Self v. Great Lakes Dredge & Dock Company*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied* 486 U.S. 1033 (1988).

FPL recognizes that the settlement bar exists, yet argues that the bar is only applicable if the settlement was entered in good faith. FPL argues that at least one other circuit has adopted a good faith requirement, see *Miller v. Christopher* (887 F.2d 902 (9th Cir. 1989)), and §886A of Restatement (Second) of Torts suggests that a good faith requirement may be warranted. However, the Eleventh Circuit has neither accepted or rejected a good faith requirement. *See Self*, 832 F.2d at 1547.

This Court declines to impose a good faith requirement where previously none existed. Accordingly, it is ORDERED:

1. Boca Grande's motion for summary judgement as to the claims of Florida Power and Light Company (D-174) is GRANTED and both the indemnity and contribution claims brought by Florida Power and Light Company, Inc. against Boca Grande Club, Inc. are barred by Boca Grande's settlement with the estates of the decedents.

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2. The Clerk is directed to administratively close this file pending the outcome of the bankruptcy proceedings currently underway for defendant O'Day Corporation.

3. Boca Grande Club, Inc. is directed to report to the Court upon the conclusion of the O'Day Corporation's bankruptcy proceedings.

DONE AND ORDERED at Tampa, Florida this 26th day of March, 1992.

/s/ _____
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

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**United States District Court
MIDDLE DISTRICT OF FLORIDA**

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88-1636-Civ-T-15A

IN THE MATTER OF THE COMPLAINT OF
BOCA GRAND CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Boca Grande's Motion for Summary Judgement as to the claims of Florida Power and Light Company is GRANTED and both the indemnity and contribution claims brought by Florida Power and Light Company, Inc. against Boca Grande Club, Inc. are barred by Boca Grande's settlement with the estate of the decedents.

March 27, 1992
Date

David L. Edwards
Clerk
/s/ _____
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E.

ORDER ON MOTION FOR INJUNCTION
and
INJUNCTION

The matter came before the Court upon Plaintiff's motion for an injunction against the filing, commencement and prosecution of any claims whatsoever against Plaintiff outside of this limitation proceeding. It appears from Plaintiff's motion and the court file in this case that Plaintiff has duly filed its complaint claiming the benefit of Title 46, United States Code, Sections 181 *et seq.*, as amended, which provides for the exoneration or limitation of liability of vessel owners. Plaintiff specifically claims the benefits of exoneration or limitation as the owner of a 16' Prindle Catamaran Sailboat in connection with a casualty occurring on the navigable waters of Gasparilla Pass on April 23, 1988.

With its Complaint Plaintiff elected to file an *ad interim stipulation*, with interest, in the amount of Plaintiff's interest in the 16' Prindle Catamaran Sailboat following the casualty. Plaintiff has also filed a separate stipulation for costs. In addition Plaintiff has filed an affidavit as to the value of its interest in the aforesaid sail-

boat. By filing the appropriate *ad interim stipulation* with interest together with the requisite stipulation for costs Plaintiff has fulfilled the requirements of 46 U.S.C. §185 and Rule F(1), Supplemental Rules for Certain Admiralty and Maritime Claims. Accordingly, Plaintiff is entitled to the injunction provided by 46 U.S.C. §185 and Supplemental Rule F(3) and it is therefore -

ORDERED as follows:

1. Plaintiff's motion for entry of an injunction be and the same is hereby granted.

2. The further prosecution of any pending actions, suits or legal proceedings in any court whatsoever, including the consolidated cases brought by the Estates of Claimants Jonathan Richards and Robert J. Polackwich pending in the Fifteenth Judicial Circuit Court in Palm Beach County bearing Case No. CL 89-9670 AH, and the institution and prosecution of any suits, actions or legal proceedings of any nature or description whatsoever in any court wheresoever, except in this proceeding for Exoneration from or Limitation of Liability, against Plaintiff in respect of any claim arising out of or connected with the casualty occurring upon the navigable waters of Gasparilla Pass on April 23, 1988 be, and the same are hereby, stayed, enjoined and restrained until the hearing and determination of this proceeding and the further Order of this Court.

3. Plaintiff shall serve by certified Mail a copy of this order upon each person or firm, or their attorneys, who have filed claims in this limitation proceeding. Plaintiff shall also cause to be filed a certified copy of this Order in any court in which any claims against Plaintiff are pending.

DONE AND ORDERED at Tampa, Florida, on this 23rd day of February, 1990.

/s/ _____
United States Magistrate

FULL AND COMPLETE GENERAL RELEASE

WHEREAS, on April 23, 1988, Robert J. Polackwich, M.D. and Jonathan Richards were in an accident on the navigable waters adjacent to Boca Grande, Florida; and

WHEREAS, as a result of said accident, Robert J. Polackwich, M.D. and Jonathan Richards died; and

WHEREAS, as a result of the deaths of Robert J. Polackwich, M.D. and Jonathan Richards, representatives of their respective estates filed lawsuits in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, against Boca Grande Club, Inc., and other defendants; and

WHEREAS, as the result of the accident which involved a 16' Prindle Catamaran owned by Boca Grande Club, Inc., Boca Grande Club, Inc. commenced an action in United States District Court, Middle District of Florida, Tampa Division, seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. §181 et seq; and

WHEREAS, the representatives of the estates of Robert J. Polackwich, M.D. and Jonathan Richards, and others (all of whom are hereinbelow identified as "Claimants") filed claims in the limitation of liability action pending in United States District Court; and

WHEREAS the Plaintiffs in the actions pending in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, and all of those who have filed claims for damages for the deaths of Robert J. Polackwich, M.D. and Jonathan Richards in the limitation action pending in United States District Court, Middle District of Florida, Tampa Division, desire to settle all of their claims against Boca Grande Club, Inc. and its vessel;

ACCORDINGLY, KNOW ALL MEN BY THESE PRESENTS:

Receipt of the sum of Two Hundred Twenty Five Thousand and No/100 Dollars (\$225,000.00) lawful money of the United States to them in hand paid by Boca Grande Club, Inc., is hereby acknowledged by:

Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr. as personal representative of the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich as personal representative of the estate of Jonathan Richards, Deceased

Stephanie J. Polackwich as mother and natural guardian of Robert Jamison Polackwich, a minor

Trudy Bergund, as mother and natural guardian of Nathan Polackwich, a minor

Alphonsus J. Polackwich

Alphonsus J. Polackwich as personal representative of the estate of Eleanor A. Polackwich, Deceased.

All of the foregoing individuals are hereinafter collectively referred to as "Claimants."

Claimants further acknowledge receipt of the aforesaid sum of money as total consideration for any and all claims by Claimants against the Released Parties only. Claimants have released, remised, acquitted and forever discharged, and by this Full and Complete General Release do release, remise, acquit and forever discharge only Boca Grande Club, Inc., and its successors and assigns, and the 16' Prindle Catamaran Sailing Vessel Hull No.

SUR06214M82E, together with its owner, charterer, operator, crew and insurers, collectively hereinafter referred to as the Released Parties, of and from all manner of actions, torts, injuries, causes of action, damages, contracts, claims, costs, expenses and demands whatsoever in law, in equity, in admiralty or otherwise, which Claimants, individually, jointly, severally or any of them, ever had, now have, or hereafter can, shall or may have against the Released Parties only upon, by reason of, or in any way growing out of any matter whatsoever arising from the injury and deaths of Robert A. Polackwich, M.D., and Jonathan Richards while aboard the 16 Catamaran Sailing Vessel on April 23, 1988.

This Full and Complete General Release as to the Released Parties only includes any claim by Claimants against the Released Parties only for any and all injuries, loss and damage, known or unknown, directly or indirectly sustained or suffered by Claimants, individually, jointly, severally, or any of them, arising out of or connected with a collision between the mast of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E and power lines crossing the navigable waters of Gasparilla Pass, including the rental from Boca Grande Club, Inc., usage, or operation of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E on April 23, 1988, for which claims have been made against the Released Parties only in those certain lawsuits now pending in United States District Court, Middle District of Florida, Tampa Division, and the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, which cases are, respectively, styled as:

**UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

Case No.: 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT
OF
BOCA GRANDE CLUB, INC. FOR

EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

**IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, STATE OF FLORIDA, IN AND FOR
PALM BEACH COUNTY, FLORIDA, CIVIL DIVISION**

Case No. CL89-9670 AH

STEPHANIE J. POLACKWICH, as Personal Representative
of the Estate of JONATHAN RICHARDS, deceased,
Plaintiff,

vs.

FLORIDA POWER AND LIGHT COMPANY, O'DAY
CORPORATION, PRINDLE CATAMARAN, INC.,
SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE,
LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTUR-
ING COMPANY, CATALINA YACHTS INC., PERFORMANCE
CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR
PUNTA CORPORATION, and BOCA GRANDE CLUB, INC.,
Defendants.

ALAN S. POLACKWICH, SR., as Personal Representative
of the Estate of ROBERT J. POLACKWICH, deceased,
Plaintiff,

vs.

FLORIDA POWER AND LIGHT COMPANY, O'DAY
CORPORATION, PRINDLE CATAMARAN, INC.,
SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE,
LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTUR-
ING COMPANY, CATALINA YACHTS INC., PERFORMANCE
CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR
PUNTA CORPORATION, and BOCA GRANDE CLUB, INC.,
Defendants.

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Claimants do hereby consent and agree that all of their claims and complaints against the Released Parties only made and outstanding against the Released Parties only in the aforementioned lawsuits shall be forthwith dismissed with prejudice. This Full and Complete General Release as to the Released Parties only does not in any way release or discharge FLORIDA POWER AND LIGHT COMPANY, O'DAY CORPORATION, PRINDLE CATAMARAN, INC., SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE, LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTURING COMPANY, CATALINA YACHTS INC., PERFORMANCE CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR PUNTA CORPORATION, or their insurers. Claimants hereby specifically reserve all of their claims and actions against said parties, and nothing contained in this Full and Complete General Release shall be construed or deemed to be a release of Claimants' claims and actions against any of said parties.

It is expressly understood and agreed that the acceptance of the aforesaid sum of money is in full accord and satisfaction of disputed claims by and between the parties to this settlement only, which claims are set out in the above identified lawsuits and that the payment of the aforesaid sum is not an admission of liability on the part of the Released Parties, each of whom expressly denies liability.

In further consideration of the aforesaid sum of money being paid to Claimants, Claimants, and each of them, do hereby covenant with and represent to the Released Parties that Claimants are the owners of the claims as to the Released Parties set forth in the above identified lawsuits.

In witness whereof, each of the Claimants hereinabove identified has executed this Full and Complete General Release as to the Released Parties only with effect as to each as and from the day and date of their respective signatures.

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/s/ _____
Alan S. Polackwich, Sr.

/s/ _____
Alan S. Polackwich, Sr. As
Personal Representative of the
Estate of Dr. Robert J. Polackwich

State of Florida
County of Indian River

Personally appeared Alan S. Polackwich, Sr., an individual well known to me, who upon being duly sworn, deposed and said that he is the individual signing the above and foregoing Full and Complete General Release and that he signed said release both as an individual and in his capacity as the personal representative of the estate of Dr. Robert J. Polackwich and that he signed said release in his individual and representative capacities with full authority to so act and that his signatures were his free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3d day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV. 11, 1994
BONDED THRU GENERAL INS. UND.

A17

/s/ _____
Stephanie J. Polackwich

/s/ _____
Stephanie J. Polackwich as mother and Natural Guardian of Robert Jamison Polackwich, a minor

/s/ _____
Stephanie J. Polackwich as Personal Representative of the estate of Jonathan Richards

State of Florida
County of Hillsborough

Personally appeared Stephanie J. Polackwich, an individual well known to me, and upon being duly sworn, deposed and said that she is the mother and natural guardian of Robert Jamison Polackwich and the personal representative of the estate of Jonathan Richards and that she signed the foregoing Full and Complete General Release individually and as mother and natural guardian of Robert Jamison Polackwich and as the personal representative of the estate of Jonathan Richards, and that she signed the said release in her individual and representative capacities with full authority to so act and that her signatures were her free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 4th day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA.
MY COMMISSION EXPIRES: MAR. 20, 1994.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

A18

/s/ _____
Trudy Bergund as mother and Natural Guardian of Nathan Polackwich, a minor

State of Florida
County of Indian River

Personally appeared Trudy Bergund, an individual well known to me, and upon being duly sworn, deposed and said that she is the mother and natural guardian of Nathan Polackwich, a minor, and that she signed the above and foregoing Full and Complete General Release in her capacity as mother and guardian of Nathan Polackwich and that she is fully authorized to so act and her signature is her free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3rd day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:
Notary Public
State of Florida at Large
My Commission Expires Jan 20, 1992

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/s/ _____
Alphonsus J. Polackwich

/s/ _____
Alphonsus J. Polackwich as
Personal Representative of the
estate of Eleanor A. Polackwich

State of Florida
County of Indian River

Personally appeared Alphonsus J. Polackwich, an individual well known to me, and upon being duly sworn, deposed and said that he is the individual signing the above and foregoing Full and Complete General Release and that he signed said release both as an individual and in his capacity as the personal representative of the estate of Eleanor A. Polackwich and that he signed said release in his individual and representative capacities with full authority to so act and that his signatures were his free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3d day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV. 11, 1994
BONDED THRU GENERAL INS. UND.

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Acceptance of Full and Complete General Release

Boca Grande Club, Inc., on behalf of the Released Parties, hereby accepts the above and foregoing Full and Complete General Release and acknowledges, accepts, and agrees to all of the provisions therein contained.

Boca Grande Club, Inc.

By: /s/ _____
Mary Keene, Manager

County of Charlotte
State of Florida

Personally appeared Mary Keene, an individual well known to me, who upon being duly sworn, deposed and said that she is the manager of Boca Grande Club, Inc. and that she acknowledges receipt of and accepts the above and foregoing Full and Complete General Release and she is fully authorized to execute the foregoing acceptance on behalf of Boca Grande Club, Inc.

Witness my hand and seal, this 6th day of May, 1991

/s/ _____
Notary Public, State of Florida

My commission expires:
NOTARY PUBLIC, STATE OF FLORIDA.
MY COMMISSION EXPIRES: AUG. 27, 1993.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

Case No.: 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING
VESSEL, HULL NO. SUR06214M82E

STIPULATION AND JOINT MOTION FOR DISMISSAL

Boca Grande Club, Inc., Plaintiff, and
Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr. as personal representative of
the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich as personal representative of
the estate of Jonathan Richards, Deceased

Stephanie J. Polackwich as mother and natural
guardian of Robert Jamison Polackwich, a minor

Trudy Bergund, as mother and natural guardian of
Nathan Polackwich, a minor

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Alphonsus J. Polackwich

Alphonsus J. Polackwich as personal representative of
the estate of Eleanor A. Polackwich, Deceased,

hereinafter referred to as Stipulating Claimants, do hereby stipulate and agree that the claims of each of the Stipulating Claimants against Boca Grande Club, Inc. filed in this proceeding have been amicably, fairly and reasonably resolved and settled provided the conditions stated below are met and do hereby jointly move the Court for entry of an order dismissing, with prejudice, the claims of each of the above Stipulating Claimants against the Plaintiff.

The settlement between Plaintiff and Stipulating Claimants is conditioned upon the stay of this limitation action as to the remaining claims until the actions in state court have been completed. Accordingly, Plaintiff and Stipulating Claimants do hereby jointly move the Court for an Order staying the further prosecution of this action until the presently pending actions in state court have been completed. Plaintiff and the Stipulating Claimants do further move that the Court provide in its Order of Dismissal that the case will be so stayed, except for motions for summary judgment to be hereafter filed by Plaintiff as to the remaining claims of Florida Power & Light Company and the O'Day Corporation for indemnity and contribution.

The settlement between Plaintiff and the aforesaid Stipulating Claimants is also conditioned upon the Court's providing in its order of dismissal that the injunction heretofore entered by the Court in this proceeding be lifted as to the Stipulating Claimants. The order of dismissal should also specifically provide, that the injunction shall remain in full force and effect only as to any claims against Boca Grande Club, Inc.

The parties hereto further move the Court to provide in its order of dismissal that the Plaintiff and each of the Stipulating Claimants shall bear their own respective costs.

A23

Stipulated and agreed on this 10 day of December, 1990.

MACFARLANE, FERGUSON,
ALLISON & KELLY

By: /s/ _____

Jack C. Rinard #095376

D. James Kadyk #238325

P.O. Box 1531

Tampa, FL 33601

Tel: 813/223-2411

*Attorneys for Boca Grande Club,
Inc.*

SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY

By: /s/ _____

John A. Shipley

P.O. Drawer 3626

West Palm Beach

Florida 33401-3626

Tel: 407/686-6300

Attorneys for Settling Claimants

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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CASE NO. 88-1636-CIV-T-17A

IN THE MATTER OF THE COMPLAINT
OF
BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING
VESSEL, HULL NO. SUR06214M82E

ORDER

THIS CAUSE is before the Court upon the Stipulation and Joint Motion for Dismissal filed by Boca Grande Club, Inc., Plaintiff, and the following Stipulating Claimants in this case:

Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr., as personal representative of the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich, as personal representative of the estate of Jonathan Richards, Deceased

Trudy Bergund, as mother and natural guardian of Nathan Polackwich, a minor

Alphonsus J. Polackwich

Alphonsus J. Polackwich, as personal representative of the estate of Eleanor A. Polackwich, Deceased.

The Stipulation and Joint Motion for Dismissal was considered by the United States Magistrate Judge, pursuant to a specific order of referral, and the Magistrate Judge has filed his report recommending that all claims filed in this case by the Stipulating Claimants against the Plaintiff be dismissed with prejudice, subject to conditions that the Magistrate Judge recommends the Court approve.

Upon consideration of the report and recommendation of the Magistrate Judge and upon this Court's independent examination of the file, the Magistrate Judge's report and recommendation is adopted and confirmed and made a part hereof, and it is

ORDERED that:

1. The Joint Motion for Dismissal is GRANTED, and all claims of the Stipulating Claimants against the Plaintiff only are hereby dismissed with prejudice.

2. Further prosecution of this limitation action is hereby STAYED until the state court lawsuits have been terminated. The only exception to this stay is that Plaintiff may, within forty-five (45) days from the date of this Order, file motions for summary judgment as to the claims of Florida Power & Light Company and The O'Day Corporation which seek indemnity and contribution. Florida Power & Light Corporation and The O'Day Corporation will respond to any such motions filed by Plaintiff in accordance with the Local Rules of this Court.

3. The "Order on Motion for Injunction and Injunction" ("Injunction Order," doc. 55) entered by the United States Magistrate Judge on February 23, 1990 is hereby LIFTED as to each of the Stipulating Claimants and each Stipulating Claimant is free to pursue whatever actions he or she may have against parties other than Boca Grande Club, Inc. in other forums, including the action presently pending in the Fifteenth Judicial Circuit in Palm Beach County, Florida, Case No. CL 89-9670 AH. The Injunction Order remains in full force and effect only with respect to other

parties' or potential parties' actions, if any, against Boca Grande Club, Inc., as owner of 16' Prindle Catamaran Sailing Vessel and particularly with respect to the claims of parties in this action against Boca Grande Club, Inc. that have not been settled. The injunction remains specifically in effect as to claims by Florida Power & Light Company and The O'Day Corporation for indemnity and contribution. The injunction does not protect Florida Power & Light Company, The O'Day Corporation, or any party other than Boca Grande Club, Inc.

4. All pending discovery motions are hereby DENIED.

5. The entry of this Order does not make any determination as to the good faith of the settlement between the Plaintiff and the Stipulating Claimants.

6. Boca Grande Club, Inc. and each of the Stipulating Claimant shall bear their own respective costs.

DONE and ORDERED in Chambers at Tampa, Florida, this 13th day of March, 1991.

/s/ _____
UNITED STATES DISTRICT JUDGE
ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Slip Copy
61 USLW 2745
(Cite as: 1993 WL 154448 (Ala.))

NOT YET RELEASED FOR PUBLICATION.
AMERADA HESS CORPORATION, et al.

v.

**OWENS-CORNING FIBERGLASS CORPORATION
AMERICAN TRADING TRANSPORTATION COMPANY,
INC., et al.**

V.

OWENS-CORNING FIBERGLASS CORPORATION.

1911251 and 1911252.

Supreme Court of Alabama.

05-14-93.

ADAMS, JUSTICE.

*1. Amerada Hess Corporation; American Trading Transportation Company, Inc.; ARCO Marine, Inc.; Bermuth Lembcke Company, Inc.; Chevron U.S.A., Inc.; Chiquita Brands International, Inc.; Isbrandtsen Company, Inc.; Keystone Shipping Company; Marine Transport Lines; Marine Transport Management Company, Inc.; National Bulk Carriers; PACO Tankers, Inc.; Red Hills Corporation; United Brands Company; Unocal; and Warren Petroleum Company (all hereinafter referred to as the "shipowners") are defendants and third-party plaintiffs in an action by former seamen alleging asbestos injuries. The shipowners appeal from summary judgments in favor of Owens-Corning Fiberglass Corporation ("OCF") on their third-party claims seeking indemnity or contribution from OCF, whose asbestos products, it is alleged, were aboard the shipowners' vessels and injured the seamen. We affirm.

This case represents another installment in the ongoing maritime asbestos litigation addressed previously by this Court in *Foster Wheeler USA Corp. v. Owens-Illinois, Inc.*, 595 So. 2d 439 (Ala. 1992), and *Sheffield v. Owens-Corning Fiberglass Corp.*, 595 So. 2d 443 (Ala. 1992). Personal representatives of the estates of

Thomas Shepherd and James L. Burnett Sr. ("plaintiffs") sued OCF in the District Court of Dallas County, Texas, in 1987 and 1988, respectively, alleging that asbestos products manufactured by OCF had caused the deaths of their decedents, former seamen. These personal representatives, on February 8, 1990, and February 24, 1989, respectively, also filed actions against the shipowners in the Mobile County, Alabama, Circuit Court. In the Alabama actions, the plaintiffs alleged, inter alia, that the ships on which the seamen worked had been unseaworthy because of asbestos fibers aboard them. The shipowners, seeking indemnity or contribution, impleaded OCF and numerous other manufacturers of asbestos-containing products, which, they alleged, were responsible for the deaths of the plaintiffs' decedents.

Subsequently, OCF obtained agreements with the plaintiffs settling their claims against OCF and purporting to release OCF from any further liability arising out of the plaintiffs' claims. OCF then moved for summary judgments in the Mobile County Circuit Court, contending that the settlements with the plaintiffs barred the shipowners' claims against OCF for indemnity or contribution. In February 1991, the trial court entered summary judgments in favor of OCF in both cases. These judgments were subsequently certified as final judgments, pursuant to Ala. R. Civ. P. 54(b). The shipowners appealed. On July 15, 1992, this Court granted the shipowners' motions to consolidate the appeals of the summary judgments for briefing and oral argument. On August 12, 1992, the trial court granted motions filed by the shipowners to dismiss the plaintiffs' claims against them on the basis of the actions pending in Texas. In *Shepherd v. Maritime Overseas Corp.*, [Ms. 1911884, March 12, 1993] So. 2d (Ala. 1993), we reversed the judgments dismissing the plaintiffs' claims against the shipowners and remanded their causes for further proceedings.

*2. On these appeals of the summary judgments in favor of OCF, the shipowners contend that they are entitled to recover from OCF their attorney fees or damages in the event of a damages award, under (1) an indemnity theory or (2) a rule allowing contribution from a joint tort-feasor notwithstanding that tort-feasor's

settlement with, and release by, the plaintiff.

I. Indemnity

The shipowners contend that OCF's conduct in supplying asbestos-containing products for shipboard use was "actively" wrongful, while their fault consisted, they contend, only in failing to discover the danger of asbestos - conduct that they insist was only "passively" wrongful. See *Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240, 243 (5th Cir. 1977) ("the classic case of passive negligence occurs ... when one joint tortfeasor creates a danger that the other (passive) tortfeasor merely fails to discover or to remedy"); *Avondale Shipyards, Inc., v. Vessel Thomas E. Cuffe*, 434 F. Supp. 920, 928 (E.D. La. 1977) ("breach [of] an absolute duty to provide a seaworthy vessel" constitutes passive fault). They contend that maritime law accords them a right to recoup their attorney fees from OCF pursuant to a theory of "active" versus "passive" fault.

Preliminarily, we note that the procedural posture of the shipowners in this case renders their claims for indemnity particularly unpersuasive. Specifically, the shipowners are nonsettling, third-party plaintiffs seeking indemnity from third-party defendant OCF, following OCF's settlement with the plaintiffs.

"The basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." Restatement (Second) of Torts § 886B (1977), comment c. "The unexpressed premise has been that indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and fair that the indemnitor should bear the total responsibility, rather than to leave it on the indemnitee..." *Id.*

At this stage, the shipowners have satisfied no obligation. Nor has OCF, which was impleaded by the shipowners, been unjustly enriched by the shipowners' litigation. This case thus involves none of the traditional elements necessary to trigger a right to

indemnity. On a more general ground, however, recent developments in maritime law render misplaced an admiralty defendant's reliance on the active-passive fault doctrine.

In 1975, the United States Supreme Court abrogated the "divided damages" rule set forth in *The Schooner Catherine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), which required joint maritime tort-feasors to share damages equally, regardless of their relative degrees of fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). In so doing, it established in maritime law the concept of comparative fault, that is, a "rule requiring, when possible, the allocation of liability for damages in proportion to the relative fault of each party." *Id.* at 398

*3. After *Reliable Transfer*, a number of admiralty courts concluded that maritime law no longer recognized a right to indemnity based on the active-passive fault distinction. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154 (5th Cir. 1985); *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982). In this connection, *Loose* offered the following pertinent comments: "The introduction of the rule of comparative fault to maritime torts requires reconsideration of the active-passive negligence doctrine. The common law courts were at first unwilling 'to make relative value judgments of degrees of culpability among wrongdoers.' The principle that an actively negligent tortfeasor should be required to indemnify a tortfeasor only passively negligent was developed to alleviate the harsh rule that prohibited apportionment among tortfeasors. In a sense, then, the indemnity rule was a precursor of modern systems of comparative fault because it attempted to transfer ultimate legal liability to the defendant truly in the wrong. Comparative fault seeks the same objective both more persuasively and more accurately. A comparative fault system not only eliminates the doctrine of contributory negligence but also apportions fault among joint tortfeasors in accordance with a precise determination, not merely equally or all-or-none. "It is difficult to see the need for the active-passive

indemnification rule in a comparative fault system. While the active-passive concept is more equitable than strict nonapportionment, there have never been satisfactory distinctions between the definition of 'active' and 'passive.' The district court in this case did not attempt to define these terms, but left it to the jury to define them from their everyday significance. As the district judge pointed out, however, it would have been difficult on the authority of decided cases to phrase a charge that would have been instructive and clear. There is, therefore, all the more reason to determine the degree of responsibility of each tortfeasor on the facts as presented at trial, and then to apportion damages among the tortfeasors on that basis. *Leger [v. Drilling Well Control, Inc.]*, 592 F.2d 1246 (5th Cir. 1979),] has already extended the *Reliable Transfer* concept of proportionate fault to maritime personal injury cases. We reaffirm that extension and emphasize what other courts and commentators have said before us: the concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party." 670 F.2d at 500-02 (footnotes omitted). See also D. Owen and J. Moore III, *Comparative Negligence In Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 955 (1983) ("rationale of *Reliable Transfer* 'is strongly at odds' with that of tort indemnity"). We find this reasoning persuasive and hold that there is no right to indemnity based on a distinction between active and passive fault in maritime actions filed in Alabama state courts.

II. Contribution

*4. OCF's contention that its settlements with the plaintiffs extinguish the shipowners' claims for contribution presents this Court once again with the question of the effect of a settlement on a tort-feasor's liability to joint tort-feasors for contribution. The issue was presented earlier in *Foster Wheeler USA Corp. v. Owens-Illinois, Inc.*, 595 So. 2d 439, 442-43 (Ala. 1992), another appeal spawned by the maritime asbestos litigation in progress in Mobile County. Although we ultimately deferred a decision on that question because of the brevity of the parties' treatment of the issue in

relation to its potential impact on the large volume of pending cases, we stated: "The resolution of this issue is not without difficulty, as evidenced by the three approaches expressed in the Restatement (Second) of Torts s 886A, comment m: "'m. Release. There are three possible solutions for the situation in which one tortfeasor pays a sum to the injured party and takes a release or covenant not to sue that does not purport to be a full satisfaction of the claim. Each has its drawbacks and no one is satisfactory. "'[Option I]. The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation. This has been called the fairest solution, but it has proved to be very discouraging to settlements. A tortfeasor (and his insurance company) has no incentive to make an individual settlement if he is not at all sure that it will extinguish his liability and allow him to close his books on the subject. This works most decidedly to the detriment of the settling tortfeasor, and the insurance companies have been strongly opposed to it. "'[Option II]. The money paid extinguished both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution. This solution favors the settling tortfeasor and his insurance company and is supported by them. But it can be very unfair to the other tortfeasors and provides a clear incentive to collusion between the settling parties. To avert this it may be necessary to impose a requirement of "good faith." But once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated. "'[Option III]. The money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the [pro rata] equitable share of the obligation of the released tortfeasor. This solution works strongly against the interest of the injured party and may have the effect of discouraging him from entering into a

settlement. It may, for example, make it not desirable for him to accept the full amount of coverage in a minimum insurance policy if the equitable share of the obligation of the tortfeasor is likely to be substantially larger.

*5. "Important policy reasons therefore weigh against each of the three solutions. Case authorities and statutes are also divided and there is no semblance of a consensus. The experience in drafting the uniform laws depicts the difficulties of the problem. The 1939 uniform act adopted the first solution; the 1955 act supplanting it adopted the second solution; and the 1977 act supplanting it adopted the third solution. "The Institute leaves these issues to a caveat and takes no position." (Emphasis added [in *Foster Wheeler USA*].)" 595 So.2d at 442-43

(quoting Restatement (Second) of Torts s 886A (1977), comment m). The shipowners urge us to adopt Option I, under which, they contend, their claims against OCF for contribution would remain viable.

At the outset of our discussion of this issue, we note that "attorney's fees and legal costs incurred by the defending tortfeasor [are] not recoverable in contribution from the other negligent parties." *ODD Bergrs Tankrederi A/S v. S/T Gulfspray*, 650 F.2d 652, 655 (5th Cir. 1981). However, resolution of the question regarding the effect of the pro tanto settlements is necessitated by our reversal of the judgments dismissing the plaintiffs' claims against the shipowners in *Shepherd v. Maritime Overseas Corp.*, [Ms. 1911884, March 12, 1993] So. 2d (Ala. 1993). Moreover, because the issue is of grave consequence to the litigation pending in Mobile County, we deem it expedient at this time to set forth rules governing its disposition.

Federal courts sitting in admiralty have reached no consensus on this issue. The Fifth Circuit Court of Appeals currently allocates damages among the tort-feasors on a pro rata basis consistent with Option III, as applied in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979); see *Teal v. Eagle Fleet, Inc.*, 933 F.2d

341 (5th Cir. 1991); *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430 n.11 (5th Cir. 1988) (in dicta, approving *Leger's* allocation method), *cert. denied*, 490 U.S. 1106 (1989); *Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir. 1987); *Martin v. Walk, Haydel & Assoc., Inc.*, 742 F.2d 246 (5th Cir. 1984); or, alternatively, reduces the plaintiffs total claim by the amount of the pro tanto settlement, consistent with Option II, see *Rollins v. Cenac Towing Co.*, 938 F.2d 599 (5th Cir. 1991), *cert denied*, U.S., 112 S. Ct. 1242 (1992); *Myers v. Griffin-Alexander Drilling Co.*, 910 F.2d 1252 (5th Cir. 1990) (disapproving *Leger's* damages allocation procedure); *Hernandez v. M/V Rajaon*, 841 F.2d 582 (5th Cir.), *cert denied*, 488 U.S. 981 (1988); but does not permit contribution from a settling tort-feasor as provided by Option I. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 834 (5th Cir. 1992). The Seventh Circuit Court of Appeals rejected Option III but declined to choose between Options I and II. In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992). The Eighth Circuit Court of Appeals has adopted Option III and criticized Option I. *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991). See also *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991) (expressly rejecting Option I and applying a combination of Options II and III).

*6. Although these courts have expressed considerable divergence of opinion, they were virtually unanimous in declining to apply Option I until the Eleventh Circuit refused to recognize a settlement bar to contribution in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, U.S., 113 S. Ct. 484 (1992). *Miller v. Christopher*, 887 F.2d 902, 906 (9th Cir. 1989) (criticizing Option I and noting that no federal admiralty court had applied it). The shipowners have been able to cite no other admiralty case applying that approach. However, they urge us to follow *Great Lakes Dredge* on the ground, inter alia, that because Alabama lies within the geographical area encompassed by the Eleventh Circuit, failure to follow *Great Lakes Dredge* will lead to forum shopping. We share this concern; however, our concern over the potentiality of forum shopping is insufficient to override our reluctance to follow an approach that, in this Court's view, is

inconsistent with the principles of maritime law and has no support among the rest of the federal circuits that have addressed this issue. [FN1] Indeed, our reading of Great Lakes Dredge compels us to conclude that the Eleventh Circuit's rejection of Option III and its consequent adoption of Option I resulted from its misconstruction of *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), a leading authority for the application of Option III.

In *Leger*, the plaintiff sued his employer, Drilling Well Control, Inc. ("DWC"), Dresser Offshore Services, Inc. ("Dresser"), and Continental Oil Company ("Continental") because of injuries he sustained while working on a barge owned by Dresser at the site of an offshore oil well owned by Continental. *Id.* Before trial, DWC and Continental settled with Leger for \$82,331.05 and \$100,000, respectively. Damages were awarded Leger in the amount of \$284,090 and fault was allocated according to the following percentages: (1) Leger, 35%, (2) Dresser, 45%, (3) Continental, 20%, and (4) DWC, 0%. The district court entered a judgment against Dresser in the amount of \$127,840, which "reflect[ed] the total damages of \$284,090.00 reduced by \$99,430.17 representing the 35% contributory negligence of the plaintiff and by \$56,817.24 representing the 20% negligence attributed to Continental. No reduction in the judgment was made for DWC's settlement since DWC was found not to be negligent." *Id.* at 1248. This procedure imposed upon Dresser, the nonsettling tortfeasor, liability for damages based solely on its pro rata share of the fault.

On appeal, Dresser contended that the trial court erred in refusing to calculate the judgment based on a pro tanto reduction of the total judgment by \$182,331.05, the amount of the plaintiff's settlement with DWC and Continental. It contended, moreover, that the damages recoverable under the court's pro rata method represented a windfall to Leger. The Court of Appeals for the Fifth Circuit rejected these contentions and affirmed the judgment. It explained: *7. "In accord with its ground rules, the trial court rendered judgment against Dresser for \$127,840.00, representing Dresser's percentage of negligence (45%) multiplied by Leger's damages as found by the jury (\$284,090.00). Although Leger nominally

received \$310,171.05 by virtue of the settlement and the judgment, we do not consider this a double recovery. Leger merely obtained a favorable settlement. By releasing DWC and Continental in exchange for \$182,331.05, Leger 'sold' or relinquished any claims which he had against them. See *Rose v. Associated Anesthesiologists*, 163 U.S. App. D.C. 246, 501 F.2d 806 (1974) (characterizing a settlement as a pro rata sale of the plaintiffs claim). At the time of the settlement negotiations, no one knew how a jury would apportion fault or in what amount it would find damages. By settling with Continental and DWC, Leger took the risk that he was foregoing a larger amount possibly to be obtained at trial. Likewise, Continental and DWC must have considered the amount for which they settled to be less than their exposure at trial would have been. Dresser made a different assessment. By going to trial it took the risk that the jury would find substantial damages and a high degree of negligence on its part. With the benefit of hindsight it is clear that only Leger correctly charted his course. However, according to the rules which we adopt today, Leger could have lost a great deal. For example, if he had settled with DWC and Continental for \$182,331.05 and if the jury had found \$1,000,000 in total damages, but that Dresser was only 5% negligent, Leger would have been left with the \$182,331.05 in settlement with DWC and Continental and \$50,000 in judgment against Dresser (5% of \$1,000,000). He would have released a claim subsequently found to be worth \$950,000 in exchange for \$182,331.05. He could not then complain that he made a poor settlement and that he should receive more based on the jury's assessment of his total damages at \$1,000,000. Whether the plaintiff obtains a favorable or unfavorable settlement, he may only recover once for each wrongdoer's percentage of fault." *Leger*, 592 F.2d at 1250 (footnotes omitted).

As pointed out above, only one of the two nonsettling tort-feasors, Dresser, had been found negligent. Because of the procedural posture of the parties as the result of this finding, *Leger* focused primarily on only one issue necessarily implicated by Option III, that is, the method of allocating damages among the nonsettling tort-feasors. Thus, the court was not squarely confronted with two

other issues inherent in the application of that procedure- the question of joint liability among the nonsettling tort-feasors and the issue presented in this case, that is, the efficacy of a settlement as a bar to a nonsettling tort-feasor's right of contribution. As a corollary, however, the reduction of the plaintiff's claim by the amount of the settling tort-feasor's pro rata share of fault obviated the necessity of contribution from a settling tort-feasor—none of the nonsettling tort-feasors could be charged any amount representing the settling tort-feasor's share of fault. T. Schoenbaum, Admiralty and Maritime Law s 4-15, at 26 (Supp. 1992). The following remarks from Leger are also relevant in this connection: *8. "The encouragement of settlements is the final factor which must be considered in this case. Whether the plaintiff or any of the defendants are ultimately found to have made a favorable settlement, we will 'respect the aleatory nature of the settlement process...' *Doyle v. United States*, 441 F. Supp. 701, 711 n. (D.S.C. 1977). If Dresser were allowed to reduce Leger's recovery against it by the dollar value of Leger's settlement, Dresser would be left to pay a small portion (\$284,090.00 total damages minus \$182,331.05 settlement minus \$99,400 for plaintiffs contributory negligence equals \$2,358.95) of the total damages even though its negligence was the main contributing factor in causing them. Thus, Dresser would benefit substantially from its intransigence or miscalculation in refusing to settle the case. We refuse to adopt an approach which would reward a defendant for refusing to settle. If a party decides to try a case, it must be prepared to accept whatever benefits or burdens flow from its decision." *Id.* at 1250-51.

The presence in *Leger* of only one negligent nonsettling tort-feasor also occasioned Leger's most conspicuous unanswered question, that is, whether liability among remaining nonsettling tort-feasors remained joint. That Leger could be read as adopting a modified form of joint liability apparently caused some courts to reject that approach – most significantly, the Eleventh Circuit, which in a trilogy of decisions rejected the Leger approach and applied Option I. [FN2]

The litigation precipitating the Eleventh Circuit's application

of Option I involved three successive appeals, beginning with *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716, 718 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); including *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1544 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); and culminating in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, U.S., 113 S.Ct. 484 (1992). The litigation arose out of a collision on the St. Johns River between a dredge owned by Great Lakes Dredge & Dock Company ("Great Lakes") and a tanker owned by Chevron Transport Corporation ("Chevron"). The plaintiffs, having settled their claims against Chevron, sued Great Lakes, their Jones Act employer. The third-party claims of Great Lakes against Chevron for contribution were severed; thus, Chevron was not a defendant in the initial trial.

At trial, the jury, pursuant to special interrogatories on which it was to determine the relative percentages of fault of all entities involved in the accident, attributed 100% of the fault to Chevron, a nonparty. Consequently, it assessed no damages.

The issue in *Ebanks*, the first appeal, concerned only the proper method of apportioning fault. [FN3] Great Lakes contended that the method of allocation was consistent with, and required by, *Leger*. The court distinguished *Leger* on the ground that Chevron, unlike the settling defendants in *Leger*, had never been subject to the plaintiffs' claims. *Ebanks*, 688 F.2d at 720. More significantly, however, the court concluded that *Leger's* "effect as precedent [had] been weakened" by *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), *Ebanks*, 688 F.2d at 720, which involved the proper construction of an amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. s 905.

*9. The amendment at issue in *Edmonds* prevented a negligent shipowner from recouping from a longshoreman's employer, whose negligence concurred with that of the shipowner to inure the longshoreman, any damages for which the shipowner might be liable. The United States Supreme Court held that the amendment

did not abrogate the rule of joint liability long recognized in maritime torts in favor of a proportionate fault rule. [FN4] 443 U.S. at 263-64. *Edmonds* thus reaffirmed the rule allowing a maritime plaintiff "to sue in a common-law action all the wrong-doers, or any one of them, at his election," and, absent contributory negligence, to obtain a "judgment in either case for the full amount of his loss." *Id.* at 260 n.7 (quoting *The Atlas*, 93 U.S. 302, 315 (1876)).

Ebanks concluded that because maritime law, as reaffirmed by *Edmonds*, provided for recovery "against either of several tortfeasors, without regard to the percentage of fault, it was error for the trial court to distract the [jury's] attention by requiring it to allocate the degree of fault between the defendant and a non-party." 688 F.2d at 722. Implicit throughout the court's analysis of the allocation issue was its view that the *Leger* approach involved a modified form of joint liability and was, consequently, inconsistent with traditional principles of maritime law. This view of *Leger* was even more prominent in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1544 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988), on appeal following return to remand.

After remand by *Ebanks*, Great Lakes settled with all the plaintiffs except Vivian Self, the widow of a former seaman employed by Great Lakes. In the second trial of that case, the trial judge (1) apportioned the fault of Chevron and Great Lakes vis-a-vis each other but reserved to a subsequent trial an adjudication of their damages, (2) determined the liability of Great Lakes to Self, (3) and awarded damages to Self. *Self* explained the findings of the trial court as follows: "The court found that Self's total damages amounted to \$661,354.00 and that Chevron bore 70% of the fault for the accident while Great Lakes bore 30%. Because Self had already settled with Chevron [for \$315,000], and because the trial court was of the view that this court's opinion in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), required an apportionment of damages, the court awarded Self a judgment of \$198,406.20 against Great Lakes, which represents 30% of Self's total damages." *Self*, 832 F.2d at 1544-45.

A panel of the Eleventh Circuit reversed that portion of the judgment awarding damages on the basis of Great Lakes' pro rata share of fault. It held that the plaintiff's damages from the nonsettling tort-feasor should be calculated on a pro tanto basis, that is, a reduction by the amount of her settlement with Chevron, the settling tort-feasor. *Id.* at 1548.

*10. Focusing once again on the perceived tension between *Leger* and *Edmonds*, the court construed *Leger* as standing for the proposition that "it is the plaintiff who bears the loss or obtains the gain." *Self*, at 1546 (emphasis added). Concluding that such a rule was inconsistent with *Edmonds*, which, according to *Self*, required the maritime defendant to bear "any inequity which results from the implementation of a seaman's damage award," *id.*, the court went further than it had in *Ebanks*, declaring, in effect, that *Leger* could not "withstand the more recent *Edmonds* opinion." *Self*, at 1546 (citing *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988), and *Drake Towing Co. v. Meisner Marine Const. Co.*, 765 F.2d 1060 (11th Cir. 1985)).

After *Self*, Great Lakes settled with Self's estate for \$2,050,000 and, contending that it had paid more than its equitable share of the damages, subsequently sought contribution from Chevron. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, U.S., 113 S. Ct. 484 (1992). Thus, for the first time in that litigation, the Eleventh Circuit was directly confronted with the issue presented in this case, that is, the preclusive effect to be accorded a settlement and release.

In *Great Lakes Dredge*, the third and latest appeal in that litigation, the court framed the issue as "[w]hether, given the pro tanto method adopted in *Self*, a joint tortfeasor who is forced to bear more than its fair share of an injured party's damages is prohibited by a settlement bar rule from seeking contribution from a settling joint tortfeasor." *Id.* at 1580. That the *Great Lakes Dredge* court was not writing on a clean slate is obvious from the terms in which the court framed the issue. Indeed, the court expressly concluded

that *Self* had "overruled *Leger* and rejected the proportionate distribution of liability." 957 F.2d at 1581.

Considering itself bound by stare decisis, *id.* at 1580 n.4, to reject one of the two options that bars contribution from a settling tortfeasor, the court next compared the relative advantages and disadvantages of Options I and II. Observing that a nonsettling tortfeasor could, under the pro tanto approach adopted in *Self*, "be forced to pay for more than [its] proportionate share of damages," the court concluded that on balance, an equitable distribution of damages among nonsettling tort-feasors through the right of contribution outweighed the policies favoring settlements. 957 F.2d at 1581.

We might be inclined to agree with the approach thus adopted by the Eleventh Circuit if its analysis of *Leger* and, therefore, Option III were sound. We conclude, however, that the opposite is true. The court's analysis proceeded upon the premise that Option III as applied in *Leger* abrogated or modified joint liability among nonsettling tort-feasors. Such an approach would relieve nonsettling tort-feasors not only of the liability represented by the pro rata share of settling tort-feasors, but also of liability represented by the pro rata shares of the nonsettling tort-feasors, thus requiring the plaintiff to bear the risk, for example, of a nonsettling tort-feasor's insolvency. Such an approach would, indeed, contravene the policy of maritime law, which has traditionally provided "special protection" for injured seamen. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1548 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 917 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); see also *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949).

*11. Nothing in the text of the Restatement, however, or, for that matter, *Leger*, requires this result. [FN5] Significantly, the Fifth Circuit has recently declared expressly that *Leger* did not "eliminate the well established maritime rule of joint liability." *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430 n.11 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Option III, therefore, does not prevent a maritime plaintiff from recovering all his dam-

ages — minus an amount represented by the settling tort-feasor's percentage of fault — from any of the nonsettling tort-feasors. As among those tort-feasors, contribution provides the vehicle through which an equitable distribution of damages may be achieved. See *Miller v. Christopher*, 887 F.2d 902, 904 (9th Cir. 1988). The tort-feasors, rather than the plaintiff, thus bear the risk of a joint tort-feasor's insolvency.

Because this Court's understanding of Option III and *Leger* differs fundamentally from the construction offered by the Eleventh Circuit, we see no tension between Option III and maritime law such as was expressed in the *Ebanks-Self-Great Lakes* trilogy. On the contrary, this approach appears to represent the most efficient method of accommodating the policies of federal and maritime law. As discussed above, the reduction in a plaintiff's claim by the pro rata method of Option III is as likely to inure to the plaintiff's benefit as a pro tanto reduction, which obtains pursuant to Options I and II, and it does not seem unreasonable to require the plaintiff to forgo that portion of his claim represented by the pro rata fault of the tort-feasor with which he voluntarily settled. A pro rata reduction in the plaintiff's total claim also prevents unfairness to the nonsettling tort-feasors that can occur under Option II's pro tanto reduction, which "allows the plaintiff, in effect, to 'repudiate' his bargain since he can be made whole out of the pockets of the nonsettling tortfeasors." T. Schoenbaum, *Admiralty and Maritime Law* s 4-15, at 26 (Supp. 1992). Indeed, allocation of damages based on the settling tort-feasor's pro rata share of fault obviates the need for contribution to nonsettling tort-feasors. *Id.*

The application of Option III, which, unlike Option I, recognizes the finality of a settlement, also accommodates the policy of the federal courts favoring settlements. See Fed. R. Civ. P. 68; *Marek v. Chesny*, 473 U.S. 1, 12-13 (1985) (Powell, J., concurring); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); see also *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222 (S.D.N.Y. 1991).

Moreover, allowing contribution from settling tort-feasors could subject plaintiffs to liability for damages and expenses recovered by nonsettling defendants from settling defendants. For example, the settlement agreements involved in this case contained the following provision: *12. "In consideration for the payment of the aforesaid sum, the Plaintiffs ... agree to and do hereby indemnify and hold harmless OCF from any and all liability for the payment of damages by reason of any claim asserted by any person, firm, corporation or entity against OCF for indemnity or contribution as a result of any claim, demand, settlement, judgment or payment made to the Plaintiffs or their representatives, heirs or assigns, arising out of any injuries, disease, damages or death to decedent or loss of consortium or other damages to Plaintiffs." (Emphasis added.) Based on this indemnity provision, OCF has stated its intention to pursue its rights and remedies against the plaintiffs in the event the shipowners' claims against it are successful.

These considerations compel us to conclude that Option III affords the appropriate method for the disposition of maritime cases filed in Alabama state courts. The shipowners are, therefore, precluded by OCF's settlements from seeking contribution from OCF for attorney fees or damages.

The shipowners further contend that even under Option III a settling defendant must remain in the suit to litigate the issue of its own percentage of fault. They suggest that the alternative, that is, requiring the plaintiff to minimize at trial the settling tort-feasor's percentage of fault is unworkable and unfair to the plaintiff. Thus, they contend that the trial court erred in granting OCF's motions for summary judgment.

We agree that Option III requires the trial court to determine the percentage of the settler's fault. *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222 (S.D.N.Y. 1991); *Bordelon v. Consolidated Georex Geophysics*, 628 F. Supp. 810, 812-13 (W.D. La. 1986); see also M. Yeates, P. Dye, Jr., and R. Garcia, Contribution and Indemnity in Maritime Litigation, 30 S. Tex. L. Rev. 215, 246-47 (1989). However, we do not agree that requiring the plaintiff to

exculpate the settling tort-feasor at trial is unworkable or necessarily inures to the plaintiff's detriment. On the contrary, requiring an alleged tort-feasor to remain in the suit after reaching a settlement with the plaintiff would virtually nullify the utility of the rule recognizing a settlement bar to contribution — one of the principal advantages of Option III. Just as "a tortfeasor has no incentive to enter an individual settlement if it will remain vulnerable to suit based on plaintiffs claim," *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222 (S.D.N.Y. 1991), it would seem to have little more incentive to settle if it were required to remain in the suit, thus incurring further litigation expense. *Bordelon v. Consolidated Georex Geophysics*, 628 F. Supp. 810, 812-13 (W.D. La. 1986). Moreover, an alleged tort-feasor constrained to litigate the issue of its own fault after a settlement and release would have little incentive to mount a compelling defense of a position for which it could not incur further liability regardless of the outcome of the suit. *Bordelon*, 628 F. Supp. at 812-13 (W.D. La. 1986). Indeed, it is not unreasonable to suppose that a tribunal seeking to determine the percentage of fault attributable to a settling tort-feasor would find more persuasive the plaintiff's vigorous efforts at exculpating the alleged tort-feasor, bolstered, no doubt, by evidence gleaned through the tort-feasor's cooperation incident to dismissal from the suit, than the grudging defense of an unwilling litigant.

*13. In sum, the shipowners have failed to demonstrate in what respects this procedure is unworkable, and we disagree with their contentions that it is unfair. We conclude, therefore, that the summary judgments in favor of OCF were proper; those judgments are affirmed.

1911251 AFFIRMED.

1911252 AFFIRMED.

Hornsby, C. J., and Maddox, Almon, Shores, Houston, and Steagall, JJ., concur.

FN1. This Court is not bound by decisions of lower federal courts. *Ballew v. State*, 292 Ala. 460, 296 So. 2d 206 (1974), *cert. denied*, 419 U.S. 1130 (1975); *Seibold v. State*, 287 Ala. 549, 253 So. 2d 302 (1970). This rule is particularly applicable where, as here, the circuits are in conflict. See Note, The State Courts and the Federal Common Law, 27 Alb. L. Rev. 82 (1963).

FN2. A panel decision in the Court of Appeals for the First Circuit also appears to have concluded that *Leger* modified traditional principles of joint and several liability. *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

FN3. Preliminarily, the court acknowledged that it was bound by *Leger* pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), in which an en banc Court of Appeals for the Eleventh Circuit formally adopted the case law of the Fifth Circuit, from which the Eleventh Circuit was formed by the Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995.

FN4. The Court of Appeals for the Fourth Circuit had construed the statute as limiting the liability of the shipowner to its pro rata percentage of fault.

FN5. As we noted above, the issue of joint liability among nonsettling tort-feasors did not arise in *Leger* because that case involved only one nonsettling tortfeasor.

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